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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Tehama)

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTONIO H. ACOSTA,

Defendant and Appellant.

C049757

(Super. Ct. No. NCR64234)

A jury found defendant Antonio H. Acosta guilty of possession of a controlled substance. On appeal, defendant contends that his conviction should be reversed because he was unduly prejudiced by the delay between the time of the offense and the time formal charges were filed against him, amounting to a denial of his due process rights and his trial attorney's failure to object to the delay constituted ineffective assistance of counsel. Because defendant has shown no prejudice caused by the delay, we will affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On September 29, 2004, a complaint was filed in Tehama County Superior Court charging defendant with transportation of methamphetamine and alleging he had two prior convictions. According to the complaint, the crime occurred on October 11, 2002.

On October 7, 2004, a warrant was issued for defendant's arrest, and defendant was arrested January 13, 2005. On January 14, 2005, defendant was arraigned and appointed counsel. On January 19, 2005, defendant pled not guilty to the charge in the complaint. On February 1, 2005, defendant waived his right to a preliminary hearing. An information was filed on February 8, 2005, alleging the same facts set forth in the complaint. On February 14, 2005, defendant entered a not guilty plea and denied the prior convictions set forth in the information. Trial commenced on March 30, 2005.

At trial, Officer James Dodge was the only witness for the People. Officer Dodge testified that on October 11, 2002, he was on duty as a police officer for the Corning Police Department. At approximately 8:00 p.m., he stopped Gary Cronk and defendant for "riding their bicycles on a public street without head lamps," in violation of the Vehicle Code. Officer Dodge asked both individuals for identification and they complied with his request. After running license and warrant checks on both individuals, Officer Dodge searched Cronk for weapons, based on an outstanding warrant. While Officer Dodge searched Cronk, he observed defendant making "an underhanded

throwing motion behind his back" and saw a "light-colored plastic item" leave his hand. When Officer Dodge asked defendant if he threw something, defendant said no and acted like nothing had happened.

Officer Dodge later retrieved the item he saw defendant throw, which he described as "a brown substance wrapped in a white plastic baggie." The parties stipulated the substance was a usable quantity of methamphetamine, and it was admitted into evidence as People's exhibit No. 1.

Defendant testified on his own behalf. For the most part, his testimony mirrored that of Officer Dodge; however, he denied throwing anything the night he was stopped. Defendant stated he never possessed People's exhibit No. 1 and did not even learn there was a problem stemming from these events until a few months before trial. Additionally, defendant testified that he returned to the scene to retrieve his identification moments after he first left. Officer Dodge testified he did not believe this happened.

Officer Dodge and defendant were the only two witnesses who testified. After one day of trial, the jury found defendant not guilty of transportation of a controlled substance, but found him guilty of the lesser included offense of possession of a controlled substance. The trial court sentenced him to three years in state prison for the conviction, doubled to a total of six years because of his prior serious felony conviction for burglary. This appeal followed.

DISCUSSION

Defendant claims his conviction must be reversed because of the prejudicial delay between the time of the crime and the filing of formal charges, which violated his right to due process. The People contend that defendant forfeited this argument by failing to raise it in the trial court and he cannot demonstrate that the failure to make the argument in the trial court constituted ineffective assistance of counsel. Furthermore, the People argue defendant has not demonstrated the requisite prejudice attributable to the delay to establish a violation of due process.

Defendant may have forfeited his claim of prosecutorial delay by failing to raise the issue in the trial court. (*People v. Wright* (1990) 52 Cal.3d 367, 389; see *People v. Jenkins* (2000) 22 Cal.4th 900, 1000.) However, to determine whether trial counsel's failure to raise the issue constituted ineffective assistance, we must first examine whether defendant's argument would have succeeded if it had been presented to the trial court. (*Strickland v. Washington* (1984) 466 U.S. 668, 687 [80 L.Ed.2d 674, 693] [To demonstrate ineffective assistance of counsel, defendant must show counsel's action was, objectively considered, both deficient under prevailing professional norms and prejudicial].) Thus, even if the argument was forfeited, we must still address it in determining defendant's ineffective assistance claim. (See *People v. Marlow* (2004) 34 Cal.4th 131, 150 [Even where an issue has been forfeited, if defendant "asserts his counsel thereby

rendered ineffective assistance . . . we turn to the merits of the claim"].)

The statute of limitation applicable to a criminal offense generally establishes the temporal boundaries within which a prosecution must be commenced. (*People v. Archerd* (1970) 3 Cal.3d 615, 639.) Here, defendant was charged with transportation of a controlled substance, which has a three-year statute of limitations. (See Health & Saf. Code, § 11379, subd. (a); Pen. Code, § 801.) Thus, the issuance of the arrest warrant on October 7, 2004, clearly commenced prosecution within the statute of limitation. (See Pen. Code, § 804, subd. (d).) However, a delay in filing charges that does not contravene the statute of limitation may still violate a defendant's due process rights under both the federal and state Constitutions. (*People v. Archerd, supra*, 3 Cal.3d at pp. 639-640.)

"Delay in prosecution that occurs before the accused is arrested or the complaint is filed may constitute a denial of the right to a fair trial and to due process of law under the state and federal Constitutions. A defendant seeking to dismiss a charge on this ground must demonstrate prejudice arising from the delay. The prosecution may offer justification for the delay, and the court considering a motion to dismiss balances the harm to the defendant against the justification for the delay. [Citations.] A claim based upon the federal Constitution also requires a showing that the delay was undertaken to gain a tactical advantage over the defendant. [Citations.] We have observed that '[p]rejudice may be shown by

loss of material witnesses due to lapse of time [citation] or loss of evidence because of fading memory attributable to the delay.' [Citation.]" (*People v. Catlin* (2001) 26 Cal.4th 81, 107.)

Initially, we must dispose of defendant's contention that "cases recognize that lengthy delays measuring in numerous years engender a kind of presumptive prejudice having to do with the dimming of memories, deaths or disappearances of witnesses, and loss, destruction, or degradation of physical evidence." To support this statement, defendant cites *People v. Martinez* (2000) 22 Cal.4th 750, 767-768; however, this case does not support defendant's assertion. *Martinez* dealt with the speedy trial guarantees under the federal and state Constitutions -- rights which attach after formal charges have been brought against a defendant. (*Id.* at p. 755.) Here, defendant is arguing a violation of due process and expressly concedes the "right to a speedy trial was not implicated by the delay here." Thus, *Martinez* has no application to this appeal. Moreover, defendant's statement is contrary to his own correct recitation of the law elsewhere in his brief: "In the federal cases the defendant's burden is characterized as having to show actual prejudice. [Citation.] California authority stresses that prejudice will not be presumed and that the defendant bears the burden of proving actual prejudice."

Regarding actual prejudice, defendant argues that "the defense did suffer prejudice. Neither Officer Dodge nor [defendant] could be expected to fully recall the events of their brief encounter that occurred more than 2-1/2 years before the trial." Contrary to defendant's contention, this characterization of the facts is not supported by the record, and defendant does not point to anything that would make us believe otherwise.

Officer Dodge and defendant were the only two witnesses who testified at trial. Neither witness exhibited any difficulty in recalling the facts of the night in question. Although defendant makes a bald accusation that he was prejudiced by the delay, he has not pointed to a single instance where this prejudice was apparent at trial. Both witnesses testified forcefully with complete confidence concerning the events that transpired on October 11, 2002. There was never a point during the testimony of either witness where either could not recall a specific event or were unclear about the facts of the night in question.

The burden was on defendant to demonstrate prejudice caused by the delay. (See *Scherling v. Superior Court* (1978) 22 Cal.3d 493, 504, fn. 8; *People v. Belton* (1992) 6 Cal.App.4th 1425, 1433.) Defendant failed to carry this burden. Accordingly, defendant's due process challenge is without merit, and therefore his trial counsel was not ineffective for failing to raise this argument.

DISPOSITION

The judgment is affirmed.

ROBIE, J.

We concur:

SCOTLAND, P.J.

DAVIS, J.